Hj Tahamit bin Hj Jamudin v Public Prosecutor

COURT OF APPEAL (BRUNEI DARUSSALAM) — CRIMINAL APPEAL NO 15 OF 2010
MORTIMER P, DAVIES AND ROGERS JJA
16 MAY 2011

Criminal Procedure — Sentence — Mitigating factors — Appellant convicted of attempts to rape and commit carnal knowledge — Consequences normally attendant upon rape victims not present — Consensual sex without resistance force or trauma — Whether there was distress caused to family members — No loss of virginity or innocence — Appellant 60-year-old ex-serviceman with clean record — Whether sentences imposed by trial court manifestly excessive

The appellant, a 60-year-old retired soldier, was convicted after trial of two offences of attempted rape of a girl below 14 years of age contrary to ss 376(1) and 511 of the Penal Code and one offence of attempting to have carnal knowledge of a girl below 16 years of age contrary to the Unlawful Carnal Knowledge Act ('the Act') He was sentenced to nine years jail on the first offence, 11 years jail on the second offence and three years jail on the third offence. The sentences on the first two offences were ordered to run concurrently while the sentence on the last offence was to run consecutively, making a total jail term of 14 years. No strokes were ordered as the appellant was over 50 years of age at the time. The appellant appealed to the Court of Appeal against conviction and sentence. The evidence disclosed that the girls were sisters whose parents had divorced. At the time of the offences, the girls lived with their mother in distressed circumstances. The girls' mother, who was known to the appellant, was complicit in the offences and encouraged them to offer themselves to the appellant for money. The offences took place in a jungle area where the appellant took the girls in his car. On more than one occasion their mother was present in the car. The facts showed the appellant tried to have sexual intercourse on two occasions with the younger girl and on one occasion with the elder girl, but on each occasion he failed as he was unable to have an erection. In appealing the conviction, the appellant said (i) the trial judge ought to have ruled that the appellant was impotent and that he knew he was unable to have an erection, which would have made him not guilty of the offences (ii) the conviction of attempting to have unlawful carnal knowledge of the elder girl was wrong because there was no evidence the appellant tried to penetrate her and (iii) the evidence showed the appellant had reasonable cause to believe the elder girl was of or above the age of 16 and that was a sufficient defence to any charge under the Act.

Held, dismissing the appeal against conviction, allowing the appeal against sentence:

(1) There was no medical evidence to suggest the appellant was impotent or that he had permanent erectile dysfunction. Nor did the appellant give any evidence to that effect. The admissions the appellant made in his statements to police and when he was charged were inconsistent with permanent erectile dysfunction. Far from saying it was impossible for him ever to have intercourse, he said he had the intention to commit the offences and admitted conduct consistent with doing his best to achieve penetration (see paras 13 & 15).

(2) The elder girl testified that the appellant tried to penetrate her and succeeded in partial penetration. Although the judge was unsure that partial penetration had been achieved, the girl's evidence of attempt remained. Further, in his statement to police and his answers when charged, the appellant conceded the attempt (see para 20).

(3) It was open to the trial judge to reject the appellant's defence that he had reasonable cause to believe the elder girl was of or above the age of 16. The appellant's evidence showed him to be equivocal, at most, as to whether he believed, or was even concerned, whether the girl was 16 or over (see para 25).

(4) The appellant caused none of the serious harm which attended most instances of the full offence. He was not responsible for the girls having to testify; there was consent, no resistance, force or trauma, no distress to mother and family and no loss of virginity. Both girls were sexually experienced and there was no loss of innocence. The appellant had served his country in the army for 19 years and was now over 60 years of age. These were weighty matters of mitigation to which effect must be given without belittling the seriousness of the offences committed (see paras 36–38).

(5) In all the circumstances of the case, the total sentence of 14 years jail was manifestly excessive (see para 39).

[Bahasa Malaysia summary

Perayu, askar pencen yang berumur 60 tahun, disabitkan selepas perbicaraan bagi dua kesalahan percubaan merogol kanak-kanak perempuan di bawah umur 14 tahun bertentangan dengan ss 376(1) dan 511 Kanun Hukuman Jenayah dan satu kesalahan mencuba untuk bersetubuh dengan kanak-kanak perempuan di bawah umur 16 tahun bertentangan dengan Unlawful Carnal Knowledge Act ('Akta'). Dia dihukum sembilan tahun penjara bagi kesalahan pertama, 11 tahun penjara bagi kesalahan kedua dan tiga tahun penjara bagi kesalahan ketiga. Hukuman-hukuman bagi dua kesalahan pertama dijalankan serentak, menjadikan tempoh penjara 14 tahun seluruhnya. Tiada sebatan

diperintahkan memandangkan perayu berumur lebih 50 tahun pada masa tersebut. Perayu merayu ke Mahkamah Rayuan terhadap sabitan dan hukuman. Keterangan menunjukkan bahawa kedua-dua kanak-kanak perempuan adalah adik-beradik yang mana kedua-dua ibu bapa mereka telah bercerai. Pada masa kesalahan-kesalahan tersebut, kanak-kanak perempuan tersebut tinggal bersama ibu mereka dalam keadaan menderita. Ibu kanak-kanak perempuan tersebut, dikenali oleh perayu, turut terlibat dalam kesalahan-kesalahan tersebut, dan menggalakkan mereka untuk menawarkan diri mereka kepada perayu untuk wang. Kesalahan-kesalahan tersebut berlaku di kawasan hutan di mana perayu membawa kanak-kanak perempuan tersebut dalam keretanya. Lebih daripada satu masa, ibu mereka berada dalam kereta. Fakta menunjukkan bahawa perayu mencuba untuk mengadakan persetubuhan pada dua waktu dengan kanak-kanak perempuan yang lebih muda dan dalam satu keadaan dengan kanak-kanak perempuan yang lebih tua, tetapi pada setiap keadaan dia gagal kerana dia tidak dapat mempunyai ereksi. Dalam merayu terhadap sabitan tersebut, perayu menyatakan (i) hakim perbicaran patut memutuskan bahawa perayu mati pucuk dan dia tahu dia tidak dapat untuk mempunyai ereksi, yang membuatkan dia tidak bersalah terhadap kesalahan-kesalahan tersebut (ii) sabitan bagi mencuba untuk bersetubuh kanak-kanak perempuan yang lebih tua adalah salah kerana tidak terdapat keterangan perayu mencuba untuk memasukkan dan (iii) keterangan menunjukkan perayu mempunyai kausa munasabah untuk mempercayai kanak-kanak perempuan yang lebih tua adalah berumur 16 tahun atau lebih dan bahawa pembelaan yang mencukupi kepada mana-mana tuduhan di bawah Akta.

Diputuskan, menolak rayuan terhadap sabitan, membenarkan rayuan terhadap hukuman:

(1) Tidak terdapat keterangan perubatan untuk mencadangkan perayu adalah mati pucuk atau dia mempunyai disfungsi erektil tetap. Perayu juga tidak memberi apa-apa keterangan mengenainya. Pengakuan yang dibuat oleh perayu di dalam penyataan kepada polis dan apabila dia didakwa tidak konsisten dengan disfungsi erektil tetap. Dengan tidak menyatakan ia adalah mustahil bagi dia untuk bersetubuh, dia menyatakan dia tidak berniat untuk melakukan kesalahan-kesalahan dan tindakan yang diakui konsisten apabila dia mencuba sebaiknya untuk mencapai penembusan (lihat perenggan 13 & 15).

(2) Kanak-kanak perempuan yang lebih tua memberi keterangan bahawa perayu mencuba untuk menembusi dia dan berjaya dalam sebahagian penembusan. Walaupun hakim tidak pasti sebahagian penembusan telah dicapai, keterangan kanak-kanak perempuan mengenai percubaan kekal. Selanjutnya, dalam penyataannya kepada polis dan jawapannya semasa didakwa, perayu mengakui percubaan tersebut (lihat perenggan 20).

(3) Ia adalah terbuka kepada hakim perbicaraan untuk menolak pembelaan perayu bahawa dia mempunyai kausa munasabah untuk mempercayai kanak-kanak perempuan yang lebih tua adalah berumur 16 tahun atau lebih. Keterangan perayu menunjukkan dia taksa, sekurang-kurangnya, sama ada dia mempercayai, atau mengambil berat, sama ada kanak-kanak perempuan tersebut berumur 16 tahun atau lebih (lihat perenggan 25).

(4) Perayu tidak menyebabkan kecederaan serius yang mengikuti kebanyakan kejadian kesalahan penuh. Dia bukan bertanggungjawab untuk kanak-kanak perempuan tersebut memberi keterangan; terdapat persetujuan, tiada tentangan, paksaan atau trauma, tiada kebimbangan kepada ibu dan keluarga dan tiada kehilangan dara. Kedua-dua kanak-kanak perempuan tersebut adalah berpegalaman secara seksual dan tiada kehilangan kesucian. Perayu telah berkhidmat untuk negaranya dalam tentera selama 19 tahun dan sekarang umur melebihi 60 tahun. Ini adalah perkara-perkara mitigasi yang serius di mana mesti dipertimbangkan dengan wajar tanpa mengecil-ngecilkan keseriusan kesalahan-kesalahan yang dilakukan (lihat perenggan 36–38).

(5) Dalam kesemua keadaan kes ini, keseluruhan hukuman penjara 14 tahun adalah jelas berlebihan (lihat perenggan 39).]

Notes

For cases on mitigating factors, see 5(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4062–4099.

Cases referred to

Ahmad Ibrahim v PP (Criminal Appeal No 8 of 2004) (refd)
Ibrahim bin Hj Anggas v PP (Criminal Appeal No 7 of 2008) (refd)
MS bin HI v PP (Criminal Appeal No 7 of 2005) (refd)

Legislation referred to

Penal Code ss 376(1), (2), 511
Unlawful Carnal Knowledge Act ss 2, 3

Roy Prabhakaran (Sankaran Halim) for the appellant.
Farhanah PD Suhaili (Deputy Public Prosecutor) for the prosecution/respondent.

Mortimer P:

[1] The appellant was convicted after trial by Steven Chong J of two offences of attempted rape of a girl under 14 years contrary to ss 376(1) and 511 of the Penal Code and one offence of attempting to have carnal knowledge of a girl under 16 years of age contrary to the Unlawful Carnal Knowledge Act, Chapter 29.

[2] On 7 April 2010 the judge passed sentences of nine years imprisonment on the first offence, 11 years imprisonment on the second offence and three years on the third offence. The sentences on the first two offences were ordered to run concurrently but the sentence on the third offence was to be consecutive making 14 years imprisonment in all. No strokes were ordered as the appellant was over 50 years of age at the time.

[3] The appellant appeals against both the convictions and the sentences.

THE TRIAL

[4] The appellant was originally charged with three offences of rape of a girl under 14 years of age and one of a girl under 16. The girls were sisters. Having heard the evidence the judge did not accept the evidence of either girl that she refused consent to sexual intercourse with the appellant or that he was able to penetrate either of them.

[5] Equally, the judge rejected the appellant's evidence that each girl had completely fabricated her evidence. The judge convicted the appellant upon the evidence of each girl other than on consent and penetration, and the appellant's admissions made in statements to the police.

THE FACTS

[6] The evidence discloses a disturbing story. The parents of the two girls are divorced. At the time of the offences they lived with their mother in Jerudong in distressed circumstances. The appellant, who is 60 years of age and a retired soldier, knew the girl's mother and through her came to know the girls. Although the exact circumstances which led to the offences may be unclear there is no doubt that the girl's mother was complicit in the offences and encouraged the daughters to offer themselves to the appellant for money. Both the mother and the girls contacted the appellant on his mobile telephone.

[7] The appellant knew an area of jungle near a shooting range at Jerudong and on each occasion he took the girls in his car to this area. On more than one occasion their mother was present in the car. In the jungle he spread a sheet on the ground and on two occasions tried to have sexual intercourse with the younger girl and on one occasion he tried to have intercourse with the elder girl. He failed on each occasion because he was unable to obtain an erection.

[8] The appellant described the offences in his statement to the police on 22 December 2008, the day after the last offence. In answer to question 15 he said:

> I admit that I wanted to have sex with the small girl, for 4 times but each time wanted to do it my private part did not harden (erect). And I tried to penetrate by 'sulur' (aided by my finger) but still could not probably what was in was my finger I do admit my heart wanted to do it but my private part did not erect. And during that time the girl herself took off her trousers first and never took off shirt, and later I took off my trousers. And I do admit trying to penetrate my private part, but I did not touch her breasts or kissing.

[9] He speaks of the elder girl in his answer to question 18:

> There was another one whose body was slightly big, but there was only one time and she herself asked with the prize $20 but it was also the same thing my private part did not erect, and once I did give $20 but did not do anything.

[10] In relation to the first charge on 21 December 2008 with the younger girl he also said in part of his answer to the question 23:

> … I placed a white plastic, she herself took off her trousers and only then I took off my trousers, and I tried to make my private party erect but did not erect and I also tried touching her private part with mine but could not erect even more. In the end I stopped and straightway put on my trousers and headed out, I tell them that I was going to the dam site first and would fetch them later. But not long after that I was stopped by the police and brought me together with the 2 girls to Sengkurong Police Station.

[11] The appellant was indeed stopped by the police as he walked out of the jungle. They also stopped the girls when they emerged. The police became suspicious and began enquiries which led to the discovery of the offences.

THE APPEAL AGAINST CONVICTIONS

[12] Mr Prabhakaran, who appears for the appellant takes three points.

[13] The first concerns the judge's finding that the appellant was not able to penetrate either girl because he was unable to obtain an erection. This disability occurred on each occasion he attempted intercourse. There was no medical evidence to suggest that he was impotent or had permanent erectile dysfunction. Nor did the appellant give any evidence to this effect. Nevertheless, Mr Prabhakaran submits, on the available evidence, the judge ought to have found that the appellant was impotent and knew he was unable to obtain an erection.

[14] The consequence, he submits, is that the appellant cannot be guilty of attempted rape or attempted carnal knowledge because if he knew that it was

impossible for him to obtain an erection he cannot have had the intention to penetrate either girl. He draws the analogy of the pickpocket who puts his hand into another's pocket knowing that the pocket is empty and therefore, whatever his motive, he cannot have had the intention to steal.

[15] Whereas we may be inclined to accept this novel legal proposition the factual basis for it in this case is absent. The admissions made by the appellant in his statement to which we have referred are inconsistent with permanent erectile dysfunction. Far from saying that it was impossible for him ever to have intercourse he says that he had the intention to commit the offences and admits conduct consistent with doing his best to achieve penetration.

[16] To the same effect he made two statements when he was charged. In the first when he was asked if he admitted three charges he said:

> I did do it but did not manage as my private part was weak.

[17] In the second he said:

> I want to state that every time I did it their mother was waiting inside the car and my intention was not to rape but to have sex with them. The mother asked me to pay every time I have sex with them. After I did it, my private part did not erect.

[18] We are unable to accept this first ground of appeal.

[19] Mr Prabhakaran's second point is that the judge wrongly convicted of the appellant of attempting to have unlawful carnal knowledge of the elder girl. He submits that there was no evidence that he tried to penetrate her.

[20] With respect, this is not correct. The elder girl gave evidence that the appellant tried to penetrate her and indeed succeeded in partial penetration. Although the judge was not sure that partial penetration had been achieved the girl's evidence of attempt remains. Further, in answer to question 18, to which we have already referred, and in his answers when charged the appellant concedes the attempt.

[21] The final ground of appeal urged by Mr Prabhakaran is that the judge ought to have held that the evidence was sufficient to establish the defence under s 3 of the Unlawful Carnal Knowledge Act which provides:

> 3 It shall be a sufficient defence to any charge under this Act that the person charged had reasonable cause to believe that the girl was of or above the age of 16 years.

[22] The evidence which he says establishes the defence is the appellant's

answer to question 18 which we have set out and answers he gave in cross-examination at trial. These answers are as follows:

Q. You said that you did not know [the elder girl] was under 16 years old?

A. Correct.

Q. Did you ever ask for her age?

A. I never asked about her age and she never told me.

Q. Why did you not ask about her age?

A. I did not have any wish to do so.

Q. Did you not think she was below 16?

A. No. I thought she was grown up.

Q. Were you not concerned you are having sexual intercourse with a girl?

A. I did not think about it.

Q. What made you think she was grown up?

A. Her body was big size.

Q. Do you agree girl could be below 16 even if her body was big?

A. I did not think of it.

Q. Did you ask her whether she went to school?

A. No.

Q. You knew who she was below 16 years old?

A. Disagree. I did not know her age because I did not ask her age.

[23] This defence is established if the defendant shows he believed that the girl was 16 or over and that he had reasonable cause to do so.

[24] The judge considered the defence and decided that he could not accept the appellant's evidence in these terms:

> I reject the defendant's evidence that he thought [the elder girl] was 'grown-up' because she was 'big size'. It is clear to me from the defendant's ordinary statement that he only had sexual intercourse in his mind and the age of the girls was of no concern to him as he stated in his answer to the question 21 that he 'never thought about their ages at all …'.

[25] Having this seen and heard the appellant give evidence it was open to the judge to find as he did. The record of the appellant's evidence shows him to be equivocal at most as to whether he believed or was even concerned as to whether the girl was 16 or over.

[26] For these reasons we dismiss the appeal against conviction.

THE APPEAL AGAINST SENTENCE

[27] For the purposes of this case the attempted rape offences carry a maximum sentence of 15 years imprisonment under s 376(1) read with s 511 of the Penal Code. As the girl actually consented no minimum sentence applies.

[28] Section 2 of the Unlawful Carnal Knowledge Act provides a maximum sentence of seven years and a minimum of two years imprisonment for the attempted unlawful carnal knowledge offence.

[29] In passing the total sentence of 14 years the judge noted:

> This is a case of a man who had shamelessly exploited the vulnerability of 2 young girls, who were living in a broken home in the circumstances of deprivation and neglect, in order to satisfy his lust.
>
> The principles of deterrence and the need to express society's disapproval of the defendant's despicable conduct dictates a severe sentence.

[30] After citing two decisions of this court, *MS bin HI v Public Prosecutor* (Criminal Appeal No 7 of 2005) and *Ibrahim bin Hj Anggas v Public Prosecutor* (Criminal Appeal No 7 of 2008) the judge took into account that the present convictions were of attempts to commit the offences and gave the defendant credit for his clear record.

[31] The second case cited involved an attempted rape under s 376(1) of the Penal Code of a 14 years old girl by her uncle. She resisted and was deeply distressed by the event. This court imposed a sentence of 6 and a half years imprisonment after plea with a starting point of ten years.

[32] The second case concerned two offences of rape of a 12 years old girl by her father with three similar offences taken into account under s 376(2) of the Penal Code. Force was used. This case affirms the guidelines for the full offence laid down by this court in the *Ahmad Ibrahim v Public Prosecutor* (Criminal Appeal No 8 of 2004). This sets a standard starting point of 15 years after trial with a limited increase for anysecond or subsequent offences.

[33] These guidelines were advanced against the background that the majority of full offences under s 376 have common features. These are:

(a) the accused is often an elder relative such as a father or uncle who is in a position of both trust and authority;

(b) either the girl resists and force is used, or the girl's will is overborne by the person in authority;

(c) the victim is traumatised and other members of the family are distressed;

(d) an innocent girl loses her virginity; and

(e) the accused does not accept guilt and at trial the girl is unnecessarily forced to give evidence and becomes further traumatised by reliving the events.

[34] In this case none of these serious features is present. Although at trial the appellant never offered to plead guilty to the attempts, he was unrepresented. There is no reason to think that he appreciated the importance of considering such a move or that he received any advice in this respect. Nor did the prosecution make any offer to him to accept pleas to the attempts. In these circumstances it was necessary for both girls to give evidence for the truth to emerge that the full offences had not been committed. The appellant was not responsible for the girls having to give evidence.

[35] Additionally, there was consent, no resistance, no force, no trauma, no distress to mother and family and no loss of virginity. Further, both girls were sexually experienced and there was no loss of innocence. Although under s 511 of the Penal Code attempted offences carry half the maximum sentence they often cause much of the usual harm inflicted by the full offence. That was not the position in this case.

[36] It is necessary to consider these matters because they show this to be a most exceptional case in which the appellant caused none of the serious harm which attends most instances of the full offence relevant to the guidelines set out in *Ibrahim*'s case.

[37] The judge rightly gave the appellant credit for his clear record. We would also note that his record includes serving his country in the army for 19 years before retiring as a staff sergeant. He is now over 60 years of age.

[38] These are weighty matters of mitigation to which the effect must be given. Nonetheless, we do not in any way belittle the seriousness of these attempted offences appropriately taken into account by the judge. The appellant did exploit the vulnerability of these two girls who were living in a broken home in the circumstances of deprivation and as such his conduct must

be marked by a substantial sentence.

CONCLUSION

[39] For these reasons we are persuaded that in the circumstances the total sentence of 14 years imprisonment is manifestly excessive. We allow the appeal against the sentences.

[40] Seeking to balance the substantial mitigating features as well as the serious nature of the offences we substitute the following:

(a) on the first charge (the second offence in time) for attempted rape of the under 14 years old girl, six years imprisonment;

(b) on the second charge for attempted rape of the same girl, five years imprisonment;

(c) on the third charge for attempted unlawful carnal knowledge of the 15 years old girl, two years imprisonment; and

(d) these sentences will all run concurrently making a total of six years imprisonment.

ORDERS

[41] We order:

(a) the appeal against the convictions is dismissed;

(b) the appeal against sentence is allowed;

(c) sentences totalling 14 years imprisonment are quashed,and

(d) Following sentences are substituted:

(i) The first charge; six years imprisonment.

(ii) The second charge; five years imprisonment.

(iii) The third charge; two years imprisonment.

[42] All these sentences to run concurrently making six years imprisonment in total.

Appeal against conviction dismissed and appeal against sentence allowed.

Reported by Ashok Kumar